15-418

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 881.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

LEWIS RINDSKOPF, RAPHAEL REICHMANN, AND ELIAS RINDSKOPF.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED AUGUST 23, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 881.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

LEWIS RINDSKOPF, RAPHAEL REICHMANN AND ELIAS RINDSKOPF.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Term heading, &c	1	1
Præcipe for summons	2	1
Summons	3	1
Return to summons	4	2
Complaint	5	2
Copy of bond sued on	9	3
Answer of Lewis and Elias Rindskopf	11	5
Raphael Reichmann	14	6
Supplemental and amended answer of Rindskopf	17	7
Trial	22	9
Verdict	24	10
Motion of district attorney for new trial	24	10
Order overruling said motion and judgment for defendants	26	11
Bill of exceptions	27	11
Clerk's certificate	51	20
Writ of error	52	20
Citation and return	53	21

1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held, according to law, at the city of Oshkosh, in the said district, on the second Tuesday (being the thirteenth day) of July, A. D. 1880—present, the Hon. Charles E. Dyer, district judge, presiding; Henry Fink, marshal; Edward Kurtz, clerk—among other, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
LEWIS RINDSKOPF, RAPHAEL REICHMANN, & Elias Rindskopf, defendants. } At law.

Be it remembered, that heretofore, to wit, on the 5th day of February, A. D. 1879, came the U. S. district attorney, Mr. G. W. Hazelton, and filed his præcipe for a summons against the above-named Lewis Rindskopf, Raphael Reichmann and Elias Rindskopf, defendants, which præcipe is as follows, to wit:

2 *Præcipe for summons.*

Circuit court of the United States of America for the eastern district of Wisconsin.

THE U. S. OF AMERICA
vs.
LEWIS RINDSKOPF, RAPHAEL REICHMANN, & Elias Rindskopf. }

Issue a summons in the above-entitled cause returnable according to law; complaint not served.

G. W. HAZELTON,
U. S. Dist. Attorney.

To EDWARD KURTZ, *Clerk.*

Whereupon a summons issued, returnable according to law, as follows:

3 Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
LEWIS RINDSKOPF, RAPHAEL REICHMANN, & Elias Rindskopf, defendants. }

The President of the United States of America to the said defendants:

You are hereby summoned to appear, within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your fail-

ure so to do, judgment will be rendered against you according to the demand of the complaint.

The marshal of said district is hereby commanded to serve this summons, and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said eastern district of Wisconsin, this 5th day of February, in the year of our Lord one thousand eight hundred and seventy-nine, and the Independence of the United States the 103rd.

[SEAL.] EDWARD KURTZ, *Clerk.*

G. W. HAZELTON, *U. S. Dist. Attorney.*
P. O. address: Milwaukee, Wis.

4 *Return.*

Served on the within-named Lewis Rindskopf, Raphael Reichmann, & Elias Rindskopf by showing to each of them this summons, and by delivering to each of them personally a copy thereof, this sixth day of February, A. D. 1879.

Fees, $6.06.

HENRY FINK, *Marshal.*
By W. A. NOWELL, *Deputy.*

5 *Complaint.*

FEBRUARY 7, 1879.

This day came the district attorney and filed his complaint, as follows:

The United States circuit court, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
LEWIS RINDSKOPF, RAPHAEL REICHMANN, & ELIAS RINDSKOPF.

The complaint of the above-named plaintiff, the United States of America, respectfully shows and alleges that heretofore, to wit, on the 23d day of March, A. D. 1875, at the city and county of Milwaukee, in the first internal-revenue collection district of the State of Wisconsin, the defendant Lewis Rindskopf, as principal, and Raphael Reichmann and Elias Rindskopf as sureties, duly made, executed and delivered to the plaintiff their certain bond and obligation in writing, known as a distiller's bond, a copy whereof is hereto annexed and made part of this complaint, the same being executed and delivered in pursuance of the provisions of the laws of the United States applicable thereto.

That at the time of making, executing, and delivering the said bond the said defendant Lewis Rindskopf was engaged at the place
6 aforesaid in carrying on the business of a distiller.

That in and by the said terms of the said bond the said defendants jointly and severally acknowledged themselves indebted to the United States, the plaintiff, in the full and just sum of seven thousand dollars, to the payment whereof well and truly to be made, they did jointly and severally bind themselves, their respective heirs, executors, and administrators; the said bond being subject to certain conditions thereunder written, as will more fully appear by reference to the said bond, a copy whereof is hereto annexed as aforesaid.

That afterwards, and while the said bond was in full force and life, the said conditions thereof were wholly broken and violated by the said defendant Lewis Rindskopf, in this, to wit, that he did not, in all respects, faithfully comply with all the provisions of law in relation to distillers, but, on the contrary, at and within the said county of Milwaukee and within the said first collection district of Wisconsin, he did utterly fail, neglect and refuse to pay the tax, to wit, the internal-revenue tax due and payable, and which he ought to have paid on three thousand six
7 hundred and forty proof gallons of distilled spirits, distilled by him at his distillery in said county of Milwaukee between the 25th day of April, A. D. 1875, and the first day of May, A. D 1875, amounting to three thousand two hundred and seventy-six dollars, which sum the said Lewis Rindskopf has hitherto neglected and refused to pay, although the same has been duly demanded and which sum now remains wholly unpaid and unsatisfied.

And this complaint further shows that the Commissioner of Internal Revenue, in pursuance of law and by virtue of the authority in him vested in such behalf, did, on the special list for October, A. D. 1875, upon knowledge obtained and had by him, duly assess the said tax, to wit, the said sum of $3,276.00, upon and against the said Lewis Rindskopf, distiller, as aforesaid, as such distiller, which said assessment, after being duly made, was returned by the said Commissioner of Internal Revenue to the collector for the first collection district aforesaid, who did thereupon duly demand the payment thereof of said Lewis Rindskopf as aforesaid, which payment was by the latter refused.

Wherefore the plaintiff alleges that by reason of the said several
8 provisions the said bond became and remains forfeited, and the defendants have become and are, jointly, and severally, liable to the plaintiff upon the same. That by reason of said forfeiture and of all the provisions, the plaintiff has sustained large damages, to wit, the sum of six thousand dollars, for which sum the plaintiff demands judgment ag't the said defendants with costs.

G. W. HAZELTON,
U. S. Att'y.

9 [Form 30—Revised May 31, 1880.]

UNITED STATES INTERNAL REVENUE.

Distiller's bond.

(This bond must be executed by every distiller before commencing business, and on the first day of May in each succeeding year.—Sec. 3260, U. S. Revised Statutes].

Know all men by these presents, that we, Lewis Rindskopf, of the city Milwaukee, county of Milwaukee, State of Wisconsin, as principal, and Raphael Reichman and Elias Rindskopf, both of the city and county of Milwaukee, State of Wisconsin, as sureties, are held and firmly bound unto the United States of America in the full and just sum of seven thousand dollars, money of the United States; to which payment, well and truly to be made, we, jointly and severally, bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 23rd day of March, A. D. 1875.

The condition of the foregoing obligation is such that, whereas the said Lewis Rindskopf now is, on and after the 23d day of March, 1875, to be engaged in the business of a distiller within the 1st collection dis-

trict of the State of Wisconsin, to wit, at the old Chicago road, situate in the town of Lake, *of* county of Milwaukee, and State aforesaid:

Now, therefore, if the said Lewis Rindskopf shall, in all respects, faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be encumbered by mortgage, judgment, or other lien, during the time in which he shall carry on said business, then this obligation shall be void; otherwise, it shall remain in full force.

LEWIS RINDSKOPF. [SEAL.]
RAPHAEL REICHMAN. [SEAL.]
ELIAS RINDSKOPF. [SEAL.]

Signed, sealed, and delivered in presence of—

M. RINDSKOPF.
JOS. EWALD.

☞The following instructions must be particularly observed and complied with, viz:

1st. The Christian names must be written in the body of the bond in full, and so signed to the bond, and the execution of the bond must be duly acknowledged by each of the signers before the collector, or one of his deputies, or an officer authorized to take the acknowledgment of deeds.

2d. The residence of each signer must be stated in the bond.

3d. A seal of wax or wafer must be attached to each signature.

4th. Each signature must be made in the presence of two witnesses, who must sign their names as such.

5th. There must be at least two sureties, and the bond must be dated.

6th. The sufficiency of the sureties must be shown by affidavits made on Form 33.

7th. The penal sum named in the bond must not be less than the amount of the tax on the spirits that can be distilled during a period of fifteen days, by the use of the entire spirit-producing capacity of the distillery, and should be increased from time to time, if such increase be made necessary by the increase of such capacity. "But in no case shall the bond exceed the sum of one hundred thousand dollars."

The attention of the collector to whom this bond may be offered for approval is called to the duty imposed upon him by the following provisions, contained section 3260, U. S. Revised Statutes:

"The collector may refuse to approve said bond, when, in his judgment, the situation of the distillery is such as would enable the distiller to defraud the United States."

"A new bond shall be required in case of the death, insolvency, or removal of either of the sureties, and may be required in any other contingency, at the discretion of the collector or Commissioner of Internal Revenue."

10 STATE OF WISCONSIN,
Milwaukee County, ss:

I hereby certify that on this 23d day of March, one thousand eight and seventy-five, before me personally came Raphael Reichman and Elias Rindskopf & Lewis Rindskopf, known to me to be the individuals

described in and who executed the within bond, and severally acknowledged that they executed the same.

ALB. WALBER,
Notary Public, Mil. Co., Wis.

STATE OF WISCONSIN,
Milwaukee County, ss:

Raphael Reichman and Elias Rindskopf, the sureties in the within bond, being severally duly sworn, say that they are severally residents in the State of Wisconsin, and are each of them respectively worth seven thousand dollars over and above all debts, dues, demands, and incumbrances whatever against them, besides property exempt by law from execution.

RAPHAEL REICHMAN.
ELIAS RINDSKOPF.

Sworn before me this 23d day of March, 1875—

ALB. WALBER,
Notary Public, Mil. Co., Wis.

(Indorsed:) Additional $7,000. (Form 30—Revised May 31, 1880.) U. S. internal revenue. Distiller's bond. Lewis Rindskopf, distil. Distillery No. 8, town of Lake, 1 dist. of Wis. Approved March 24th, 1875. G. Q. Erskine, collector.

11 FEBRUARY 25, 1879.

This day came the defendants Lewis Rindskopf and Elias Rindskopf, by their attorneys, Messrs. Cottrill & Cary, and filed their appearance with notice of retainer and demand for copy of complaint.

FEBRUARY 26, 1879.

This day came the defendant Raphael Reichmann, by his attorneys, Messrs. Jenkins, Elliott & Winkler, and filed his appearance, with notice of retainer and demand for copy of complaint.

MARCH 15, 1879.

This day came the defendants Lewis Rindskopf and Elias Rindskopf, by their attorneys, and filed their answer, as follows:

Answer of Rindskopf.

Circuit court of the United States, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
against
LEWIS RINDSKOPF, RAPHAEL REICHMANN, and Elias Rindskopf.

The answer of the defendants Lewis Rindskopf and Elias Rindskopf to the complaint of the plaintiff, by Cottrill & Cary, their attorneys, respectfully shows to the court:

First. They deny each and every allegation in said complaint contained.

12 Second. And for a further and second defense in this action these defendants show that on the first day of November, 1875,

the then Commissioner of Internal Revenue of the United States, upon the allegation and pretence that the defendant Lewis Rindskopf, in the month of April, 1875, was a distiller of spirits, duly licensed and authorized by law to act as such, and was during said month the owner of a duly authorized and bonded distillery, and that during said month he had produced at his alleged distillery and had removed therefrom, without the payment of the tax due the United States thereon, and with intent to evade the payment of taxes thereon and to defraud the United States thereof, eight thousand six hundred and eighty-six proof gallons of distilled spirits, alleged to have been produced and manufactured at said alleged distillery during said month of April, which allegation and pretence were wholly false and untrue in fact, did thereupon in form make an assessment upon the defendant Lewis Rindskopf therefor, and did in form assess the said Lewis Rindskopf therefor, and as a tax against him, in the sum of $7,117.20, and did return the
13 said assessment so made to the then collector of internal revenue for the first collection district of Wisconsin, in which district it was alleged that the said alleged distillery of said Lewis Rindskopf was situated, and that payment of said tax so alleged to have been assessed was demanded of said Lewis Rindskopf by said collector, and was refused; that thereupon, on the 19th day of May, 1876, said plaintiff did file in this court, upon the equity side thereof, its bill in equity, in which it was complainant and said Lewis Rindskopf and others were defendants, in order to enforce the collection from said Lewis Rindskopf and from his property of the said alleged tax and assessment; that said Lewis Rindskopf was served with process and has appeared and answered said bill in equity, averring by his said answer that said tax and assessment were wholly illegal, unauthorized, and void, as by the record of said cause will more fully appear, and which cause is still pending and undetermined in said court.

And these defendants further allege that the said tax or assessment mentioned in the complaint is for taxes upon spirits alleged to have been produced and manufactured at the same distillery and for
14 and during the same month as that for which said assessment or tax so made on the first day of November, 1875, was made and for no other, and that the said assessment or tax mentioned in the complaint must be and is included in the said tax or assessment so made on the first day of November, 1875; that each of said assessments were wholly unauthorized by law and are void; that the same were made without either the existence or proof of any facts whatever authorizing the same to be made, and are wholly unauthorized, illegal, and void, and should be so declared and adjudged by the court.

Wherefore the defendants demand judgment for their costs.

COTTRILL & CARY,
Attorneys for Defendants Lewis Rindskopf and Elias Rindskopf.

APRIL 23, 1879.

This day came the defendant Raphael Reichmann, by his attorneys, and filed his answer, as follows:

Answer of R. Reichmann.

In the circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
against
LEWIS RINDSKOPF, RAPHAEL REICHMANN, and Elias Rindskopf.

15 And the said defendant Raphael Reichmann, impleaded, &c., by Jenkins, Elliott & Winkler, his attorneys, comes and defends the said action, and for answer to the complaint of the said plaintiff denies and alleges as follows:

First. That he denies each and every allegation, matter, fact, and thing in said complaint stated and contained.

Second. That on the first day of November, 1875, the then Commissioner of Internal Revenue of the United States, upon the allegations and pretences that the defendant Lewis Rindskopf, in the month of April, 1875, was a distiller of spirits, duly licensed and authorized by law to act as such, and was, during said month, the owner of a duly authorized and bonded distillery, and that during the month he had produced at his alleged distillery, and had removed therefrom without the payment of the tax due the United States thereon, and with intent to evade the payment of taxes thereon and to defraud the United States thereof, eight thousand six hundred and eighty-six proof gallons of distilled spirits, alleged to have been produced and manufactured at said alleged distillery during said month of April, which allegation and pretence were wholly false and untrue in fact, did thereupon, in form, make an assessment upon the defendant

16 Lewis Rindskopf therefor, and did in form assess him, the said Lewis Rindskopf therefor, and as and for a tax against him in the sum of $7,117.20, and did return the said pretended assessment so made to the then collector of internal revenue for the first collection district of Wisconsin, in which said district it was alleged and claimed that the said alleged distillery of the defendant, Lewis Rindskopf was situated, and that payment of said tax so alleged to have been assessed was demanded of said Lewis Rindskopf by said collector and was refused; that thereupon, on the 19th day of May, 1876, said plaintiff did file in this court, upon the equity side thereof, its bill in equity, in which it was complainant and said Lewis Rindskopf and others were defendants, in order to enforce the collection from said Lewis Rindskopf and from his property of the said alleged and pretended tax and assessment; that said Lewis Rindskopf was served with process, and duly appeared and answered to the said bill, and therein averred that said alleged tax and assessment were wholly illegal, unauthorized, and void, as by the record of said cause will more fully appear, and which said cause is now depending and at issue and undetermined in said court.

17 That the said alleged tax or assessment in the complaint set forth is for taxes upon spirits alleged to have been produced and manufactured at the same distillery, and for and during the same month as that for which said assessment or tax so made on the first day of November, 1875, was made, and for no other, and is included therein and is part thereof; that each of said assessments were and are wholly unauthorized and void, and were made without the existence or

proof of any facts whatever authorizing the same to be made, and are without authority of law and wholly void.

JENKINS, ELLIOTT & WINKLER,
Att'ys for Def't Raphael Reichmann.

JUNE 2, 1879.

This day came the defendants, Lewis Rindskopf and Elias Rindskopf, by their attorneys, and filed their supplemental and amended answer, as follows:

Supplemental & amended answer of Rindskopf.

Circuit court of the United States, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
against
LEWIS RINDSKOPF, RAPHAEL REICHMANN, & Elias Rindskopf.

The amended supplemental answer of the defendants Lewis
18 Rindskopf, and Elias Rindskopf, to the complaint of the plaintiff by Cottrill & Cary, their attorneys, respectfully shows to the court—

First. They deny each and every allegation in said complaint contained.

Second. And for a further and second defense in this action, these defendants show that on the first day of November, 1875, the then Commissioner of Internal Revenue of the United States, upon the allegation and pretence that the defendant Lewis Rindskopf, in the month of April, 1875, was a distiller of spirits, duly licensed and authorized by law to act as such, and was, during said month, the owner of a duly authorized and bonded distillery, and that during said month he had produced at his alleged distillery, and had removed therefrom, without the payment of the tax due the United States thereon, and with intent to evade the payment of taxes thereon, and to defraud the United States thereof, eight thousand six hundred and eighty-six proof gallons of distilled spirits alleged to have been produced and manufactured at said alleged distillery, during said month of April,
which allegation and pretence were wholly false and untrue in
19 fact, did thereupon, in form, make an assessment upon the defendant, Lewis Rindskopf, therefor, and did in form assess the said Lewis Rindskopf therefor, and as a tax against him in the sum of $7,117.20, and did return the said assessment so made to the then collector of internal revenue for the first collection district of Wisconsin, in which district it was alleged that the said alleged distillery of said Lewis Rindskopf was situated, and that payment of said tax so alleged to have been assessed was demanded of said Lewis Rindskopf by said collector, and was refused; that thereupon, on the 19th day of May, 1876, said plaintiff did file in this court, upon the equity side thereof, its bill in equity, in which it was complainant and said Lewis Rindskopf and others were defendants, in order to enforce the collection from said Lewis Rindskopf and from his property of the said alleged tax and assessment; that said Lewis Rindskopf was served with process, and appeared and answered said bill in equity, averring by his said answer that said tax and assessment were wholly illegal, unauthorized, and void.

And these defendants further allege, as supplemental matter
20 and defence, the following facts, which have occurred since the former answer of these defendants in this action was made, to wit, that at a regular term of the circuit court of the United States for the eastern district of Wisconsin, held at the city of Milwaukee, in said district, to wit, on the 23rd day of April, A. D. 1879, the said cause so commenced in favor of the United States of America against the said Louis Rindskopf and others hereinbefore mentioned, came on for final hearing and determination upon the bill of complaint filed therein, the answer thereto, and the proofs taken in said cause; whereupon, by the final decree of said court then and there made on the date last aforesaid, the said bill in equity so filed was absolutely and finally dismissed, whereby it was adjudged that the said assessment, to enforce and collect which the said bill in equity was filed, was illegal, unwarranted in law or equity, and absolutely void, as by the record of said cause, to which reference is hereby made, will more fully and at large appear.

And these defendants further allege that the said tax or assessment mentioned in the complaint is for taxes upon spirits alleged to
21 have been produced and manufactured at the same distillery and for and during the same month as that for which said assessment or tax so made on the first day of November, 1875, was made, and for no other, and that the said assessment or tax mentioned in the complaint must be, and is, included in the said tax or assessment so made on the first day of November, 1875; that each of said assessments were wholly unauthorized by law, and are void; that the same were made without either the existence or proofs of any facts whatever authorizing the same to be made, and are wholly unauthorized, illegal, and void, and should be so declared and adjudged by the court.

And these defendants plead the said assessment of November 1, 1875, and the said bill in equity so filed to collect and enforce the same and the said final decree therein as a final and perpetual bar to this action.

Wherefore the defendants demand judgment for their costs.

COTTRILL & CARY,
Atty's for Def'ts, Lewis Rindskopf & Elias Rindskopf.

And afterwards, to wit, at a stated term of said court begun
22 and held according to law in the city of Milwaukee, on the first Monday (being the fifth day) of January, A. D. 1880, and on the eleventh day thereof, to wit, on the 21st day of January, A. D. 1880, the following proceedings were had, to wit:

Trial.

THE UNITED STATES OF AMERICA *vs.* LEWIS RINDSKOPF, RAPHAEL REICHMANN, & Elias Rindskopf.	At law.

This day came the district attorney, and the defendants, by their counsel, Messrs. J. P C. Cottrill and James G. Jenkins, and, by consent, it is ordered by the court that the supplemental answer of the defendants Lewis Rindskopf and Elias Rindskopf, filed herein on the second day of June, 1879, may stand as the supplemental answer of the defendant, Raphael Reichmann. And the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit: Charles H. Swan, Frank Whitnall, William M. Watt, E. J. Lindsay,

Rufus Billings, David Manville, Masson Wilgus, James Siddell, Harvey Campbell, Chauncey Simonds, J. M. Alvord, and J. B. Selby, twelve free, honest, and lawful men of the district, who were severally sworn and empanelled, and the trial not being concluded the same was adjourned until to-morrow morning.

23 JANUARY 22, 1880.

This day came the district attorney and the defendants, by their counsel, and the trial of the issue herein was resumed, and not being concluded the same was adjourned until to-morrow morning.

JANUARY 23, 1880.

This day came the district attorney and the defendants, by their counsel, and the trial of the issue herein was resumed, and not being concluded the same was adjourned until Monday morning next.

JANUARY 26, 1880.

This day came the district attorney and the defendants, by their counsel, and the trial of the issue herein was resumed, and not being concluded the same was adjourned until to-morrow morning.

JANUARY 27, 1880.

This day came the district attorney and the defendants, by their counsel, and the trial of the issue herein was resumed. And the jurors of the jury aforesaid, being charged by the court, retired to their room under the charge of a sworn officer, to deliberate upon their verdict, and with leave to bring in a sealed verdict to-morrow morning.

24 And afterwards to wit, on the sixteenth day of said term, to wit, on the 28th day of January, A. D. 1880, the following proceedings were had, to wit:

Verdict.

THE UNITED STATES OF AMERICA
vs.
LEWIS RINDSKOPF, RAPHAEL REICHMAN, & Elias Rindskopf. } At law.

This day came the district attorney and the defendants by their counsel, and the jurors of the jury came into court, and on their said oaths respectfully do say that they find the issue herein in favor of the defendants. And came the district attorney and moved the court for a new trial for reasons filed, as follows:

Motion for new trial.

The United States circuit court for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
LEWIS RINDSKOPF, RAPHAEL RIECHMAN, & ELIAS RINDSKOPF.

And now comes the plaintiff, the United States of America, and moves

the court to set aside the verdict of the jury herein, and grant a new for trial the following reasons, to wit:

1. For error on the part of the court in permitting the defendants to put in evidence the record of the suit of the United States vs.
25 Lewis Rindskopf, Moritz Wertheimer, et al., and to comment on the determination and disposition of that suit to the jury.

2. For error in permitting defendants to put in evidence the assessment of November 1st, 1875.

3. For error on the part of the court in instructing the jury that the assessment mentioned in the complaint must be treated as an absolute entirety, and that the jury must award the plaintiff the exact and entire amount of the assessment, or nothing.

4. For error on the part of the court in instructing the jury that they must be satisfied that the defendant Lewis Rindskopf manufactured and removed the amount of spirits mentioned in the assessment within the five days covered by said assessment.

5. For error on the part of the court in not instructing the jury as to the character of evidence proper to be considered in support of the assessment, and in connection therewith.

6. For error in instructing the jury that the assessment is only prima facie evidence, and may be assailed and overcome by oral testimony, tending to show that the distillery in question was not run in violation of law.

7. For error in failing to instruct the jury in regard to the proper and lawful presumption on the part of the jury respecting the
26 act of the Commissioner of Internal Revenue, in making the assessment in question, and in regard to the law authorizing the assessment, in view of the attack made upon the Commissioner as well as the law by defendants' counsel in their argument to the jury.

8. Because the verdict of the jury is against the evidence.

9. Because the verdict of the jury is against the law.

G. W. HAZELTON,
U. S. Att'y.

MAY 29, 1880.

Before the Hon. Thomas Drummond, circuit judge, presiding, and the Hon. Charles E. Dyer, district judge.

This day came the district attorney and the defendants by their counsel, Mr. Cottrill, and the motion of the plaintiff for a new trial came on to be heard, and was argued by said counsel, and the hearing being concluded, the court held the same under advisement.

And now at this same term, to wit, July term, A. D. 1880, and on the second day thereof, to wit, on the 14th day of July, A. D. 1880, the following proceedings were had, to wit:

Order overruling motion for new trial, &c.

THE UNITED STATES OF AMERICA
vs.
LEWIS RINDSKOPF, RAPHAEL RIECHMAN, & Elias Rindskopf. } At law.

27 This day came the district attorney and the defendants, by their counsel, and on consideration of the motion of the plaintiff

for a new trial and the arguments of counsel thereon, it is ordered by the court that said motion be, and hereby is, overruled.

Whereupon it is considered and adjudged by this court now here that the United States of America, plaintiff, take nothing by its writ.

Judgment roll signed July 14th, A. D. 1880.

EDWARD KURTZ, *Clerk.*

And same day, bill of exceptions signed and filed as follows, to wit:

Bill of exceptions.

In the U. S. circuit court, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
LEWIS RINDSKOPF, RAPHAEL REICHMAN, & Elias Rindskopf.

This cause coming on to be tried on the issues raised by the pleadings on file therein, and a jury having been duly sworn and empannelled therein, the plaintiff offered evidence tending to maintain the issues on its part, as is generally stated in the charge of the court hereinafter contained, and the defendants offered evidence tending to maintain the issues on their part, as is in like manner stated in the charge of the court.

28 Whereupon the court charged the jury as follows, after which they retired to deliberate on their verdict:

The charge.

GENTLEMEN OF THE JURY: This is an action upon what is known under the internal revenue law as a distiller's bond, and is brought to recover from the defendant Lewis Rindskopf, as principal, and the other defendants, as sureties in the bond, the amount of a certain assessment made by the Commissioner of Internal Revenue against the defendant Lewis Rindskopf, as a distiller, for a period extending from the 25th day of April, 1875, to the 1st day of May, 1875, the assesssment covering a period of 5 days.

A certain statute of the United States provides that every person intending to commence or continue the business of a distiller shall on filing with the collector of internal revenue his notice of such intention, and before proceeding with such business, and on the first day of May of each succeeding year, execute a bond in the form prescribed by the Commissioner of Internal Revenue, conditioned that he shall faithfully comply with all the provisions of law relating to the duties and business of distillers, and among other things that he shall pay all
29 penalties incurred or fines imposed on him for a violation of any of the said provisions.

The law further provides that such bond shall be with at least two sureties, to be approved by the collector of the district, and for a penal sum not less than double the amount of tax on the spirits that can be distilled at his distillery during a period of 15 days. Without the execution of this bond the business of distilling spirits is, by the statute, made unlawful, and a failure to give such a bond by a person engaging in the business subjects him to certain penalties and his dis-

tillery property to forfeiture. Further provisions of law require the payment by the distiller of a tax on every proof-gallon of spirits distilled or produced by him, which tax, during the period covered by the assessment in question, was 90 cents on each proof-gallon.

Still further, the statute provides that the tax upon any distilled spirits removed from the place where they were distilled, and not deposited in bonded warehouse, as required by law, shall, at any time when knowledge of such facts is obtained by the Commissioner of Internal Revenue, be assessed by him upon the distiller of the same, and returned to the collector for collection; and the Commissioner is fully empowered to make such assessments when the taxes have not
30 been duly paid by stamp at the time and in the manner provided by law. When, therefore, a distiller, by design or otherwise, fails to pay the taxes imposed by law upon all of the spirits he manufactures it becomes the duty of the Commissioner to make an assessment against him for whatever amount of taxes he may ascertain to have been unpaid, and a failure to pay the amount of a valid assessment thus made results in a liability to the government on the part of the sureties as well as the principal in the bond which the distiller is required to give as a condition to engaging in the business, provided the assessment is of taxes upon spirits produced during the life of the bond.

It is not disputed that the defendant Lewis Rindskopf was a distiller in this district, carrying on what was known as distillery No. 8, on the 26th, 27th, 28th, 29th, and 30th days of April, 1875, which are the days covered by the assessment in question.

The bond in the present case is dated March 23d, 1875. The period covered by the bond, and for which it could run, was from that date to May 1st, 1875. The penal sum named in the bond is $7,000, and the condition of the instrument is that "if the said Lewis Rindskopf
31 shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, &c., then this obligation shall be void; otherwise it shall remain in full force."

Now it is alleged by the United States that while the bond was in force the condition thereof was broken by the defendant Lewis Rindskopf in this, that he did not comply with all the provisions of law in relation to the duties and business of distillers, and that this alleged non-compliance consisted in his failure and neglect to pay the tax on 3,640 proof-gallons of distilled spirits, alleged to have been distilled by him on the 26th, 27th, 28th, 29th, & 30th days of April, 1875, amounting to $3,276.

It is further alleged that the Commissioner of Internal Revenue assessed on the October list, 1875, by assessment dated November 20, 1875, the taxes before mentioned against the defendant Lewis Rindskopf. That this assessment was returned by the Commissioner to the collector of internal revenue for this district, and that the same has not been paid.

In support of the plaintiff's claim to recover there have been introduced in evidence, in the first instance, the bond in suit and
32 also the assessment in question made by the Commissioner of Internal Revenue.

The defences interposed by the defendants consist, first, of a general denial of all liability, which is a defence involving the justness, correctness, and validity of the assessment; and, secondly, that a previous assessment against the defendant Lewis Rindskopf for the month of

April, 1875, made by the Commissioner on the first day of November, 1875, together with the record of the chancery suit, which was heretofore prosecuted in this court by the United States, to enforce such assessment, constitute a bar to the right of the United States to recover in this action the amount of the assessment of later date, namely, Nov. 20, 1875. Touching this second defence, it may be here remarked that I have admitted in evidence the record of the assessment of Nov. 1st, 1875, and of the chancery suit, in which that assessment was held unsustained and invalid, holding, however, at the time it was so admitted that without further proof, tending affirmatively to show that the spirits mentioned in the second assessment were included in the 1st assessment such record of the first assessment and of the chancery suit would not be a bar to the prosecution of this action,
33 and to that opinion I still adhere and reiterate the ruling heretofore made upon that branch of the case. As just stated, the first defence, which consists of a general denial of liability, involves the correctness and validity of the assessment in question, and in maintaining this defence it is contended that the defendant Lewis Rindskopf did not manufacture and produce within the period covered by the assessment in question the quantity of spirits upon which taxes were not paid, which is stated in and forms the basis of that assessment, and it is denied that he manufactured and produced any spirits upon which the taxes were not paid during the period covered by the assessment. I have already spoken of the general power of the Commissioner in making an assessment like that in question here. This power is one of the most important delegated to the Commissioner, and can only be duly exercised upon evidence which fully satisfies his mind that it ought to be exercised. When, therefore, an assessment has been made by this officer it is to be presumed until such presumption is overcome by proof to the contrary that it was made upon sufficient evidence, and it is not necessary that the evidence upon which the Commissioner acted
34 should be laid before the jury. In other words the jury have a right to presume until the contrary appears that when the Commissioner made the assessment in question he had before him proofs which were sufficient to satisfy a just and fair-minded person that such assessment ought to be made; and before the jury can disregard the assessment they should be convinced by the evidence that the Commissioner acted in making it in a manner unjust to the defendant distiller and unwarranted by the actual facts. Such an assessment is not, however, conclusive evidence of the liability of the distiller; it is open to attack; it is prima facie proof only of such liability, and prima facie evidence is such evidence as is sufficient when unassailed to establish a given fact, and it remains sufficient for that purpose until it is rebutted and overcome.

The defendants have the right to introduce evidence to overcome the assessment. Such evidence may consist of the testimony of witnesses that no spirits were manufactured during the period covered by the assessment and removed from the distillery upon which the government tax was not paid, and of circumstances which tend to the same conclusion.

35 Upon introduction of the assessment in evidence a prima facie case of liability on the part of the defendant Lewis Rindskopf is made. The burden of proof then falls upon the defendants who may proceed to introduce evidence to overcome the assessment by showing that the defendant Lewis Rindskopf did not during the period covered

by the assessment manufacture and remove from his distillery spirits upon which the tax was not paid.

And upon it being made so to appear the burden of proof then shifts to the plaintiff, and it then becomes incumbent on the plaintiff to maintain and establish the correctness of the assessment by sufficient and competent evidence. In other words in an investigation involving the validity of a tax assessed by the Commissioner of Internal Revenue, if the distiller shows by satisfactory evidence that the amount of spirits upon which he has paid a tax fully equaled the amount of his production during the period covered by the assessment the burden is then transferred to the government to show that the amount of his actual production exceeded the amount upon which he paid a tax. Giving to the rule thus stated practical application to the present case, if
36 the assessment in question has been overborne by the proofs offered on the part of the defendants, then there is devolved upon the government the burden of satisfying you by competent evidence that the defendant Lewis Rindskopf did on the days covered by the assessment remove from the distillery to some other place than the government warehouse 3,640 proof-gallons of spirits upon which the government tax was not paid.

The order of proof which has been maintained upon the trial is in consonance with the rules of law applicable to such a case, which have just been stated.

The government in the first instance to maintain the issue upon its part introduced in evidence the assessment in question and the bond executed by the defendants. This made a prima facie case against the defendants, and if no proofs had been offered on the part of defendants assailing the correctness and justice of the assessment, the plaintiff, upon production of the assessment and bond would have been entitled to a verdict for the amount of the assessment. Thus the case stood before any evidence was offered on the part of the defendants.

37 The defendants then proceeded to introduce evidence on their part for the purpose of overthrowing the assessment, and their testimony being concluded, the plaintiff then assumed the burden of sustaining the assessment and of attempting to show that it was a correct, just, and valid proceeding on the part of the Commissioner, so that the question is now open for you to determine, and it is your duty to determine whether or not the defendant Lewis Rindskopf did on the 26th, 27th, 28th, 29th, and 30th days of April, 1875, remove from his distillery to a place other than the bonded warehouse 3,640 proof gallons of distilled spirits without payment of the government tax thereon, and if upon the whole evidence you find that he did, then the plantiff will be entitled to a verdict for the amount of the assessment. If, on the contrary, you find that he did not, then of necessity you will find that the Commissioner's assessment is not sustained and ought not to have been made, and the defendants will be entitled to a verdict.

It has been admitted on the trial and is part of the proof in the case, on the part of the defendants, that the capacity of the defendants' distillery for the month of April, 1875, as shown by the survey of
38 the same made by the government, pursuant to the requirements of law was $31{,}225\frac{74}{100}$ proof gallons; that for that month he reported as produced to the collector of internal revenue $25{,}963\frac{69}{100}$ gallons, which it is said exceeded by nearly 1,000 gallons 80 per cent. of the producing capacity. That for the same month of April he paid taxes upon $30{,}286\frac{07}{100}$ gallons, the amount of tax so paid being $27,227.70, and since the quantity upon which he paid the tax for the month of

April nearly equalled the capacity of the distillery for that month as established by the survey, it is contended that it was impossible that he should have produced the quantity of spirits charged against him in the assessment on the last five days of April, namely 3,640 proof gallons, upon which the tax was not paid, and this branch of the evidence is by the defendants' counsel very strongly urged upon your consideration as establishing the claim that the assessment was not and is not supported by the facts existing at the time, and therefore ought not to be maintained as establishing a valid liability against the defendants.

Numerous witnesses have been examined and much testimony has been introduced on the part of the defendants for the purpose of
39 showing that the distillery of the defendant Lewis Rindskopf was honestly operated throughout the month of April, 1875; that no illicit spirits were manufactured during that period; that no spirits were removed from the distillery to any other place than the government warehouse without payment of the tax thereon, and that the actual production of the distillery during that month was honestly and faithfully reported, and that the defendant Lewis Rindskopf paid all the taxes on account of the production of the spirits during the month of April, 1875, to which the government was justly entitled. The government gauger and store-keeper stationed at the distillery during that month, the manager of the distillery, Siegfried Rindskopf, all the employees, except one, who, the testimony shows, is now dead, the former collector of internal revenue and his deputy, and the defendant Lewis Rindskopf have been examined upon this branch of the case. From these witnesses you have had testimony tending so show the manner in which the distillery was then operated, the time each day during which it was in operation, the manner in which the distillery was constructed, the methods, character, and extent of the business, the situation of the various parts of the distillery establishment, and generally as
40 to whether the business of distilling spirits was legitimately conducted, and without fraud on the part of those operating the same.

I shall not attempt to review or comment upon the testimony in detail. It has been very thoroughly discussed by counsel; and is before you for consideration. Upon this testimony, in connection with other testimony and circumstances which it is claimed tend to the same conclusion, it is insisted on the part of the defendants that there was no illicit manufacture or disposition of spirits at the distillery during the month of April, 1875. That there was not removed from the distillery to any place other than the bonded warehouse, and without payment of all taxes due to the government the quantity of spirits named in the assessment in question, or any quantity of spirits on the 26th, 27th, 28th, 29th, and 30th days of April, 1875, or during any portion of said month. Upon the testimony it is claimed that it has been satisfactorily established that the real facts as they existed at the time furnished no basis for the assessment which the government is now seeking to enforce, and that in consequence it ought not to be recognized as a just or valid liability against the defendants.

41 In answer to the evidence thus adduced by the defendants, and in support of the assessment, the plaintiff has given evidence which it is claimed tends to show that spirits were manufactured and removed from the distillery, during the days covered by the assessment, upon which the tax was not paid, and for that purpose numerous witnesses have been called, whose testimony is before you. The returns of the collector of internal revenue of the defendant, distiller, for the

months of February, March, April, May, June, August, September, and part of October have been put in evidence, and in that connection the witness Forbes, a deputy collector, was examined for the purpose of showing his ascertainment, by computation made on the basis of such reports, of the average amount of spirits produced from each bushel of grain in each of said months, according to such returns. From this evidence, it appears that the distillery was seized in the month of May, 1875; was under seizure for a period of three days during that month; that it was operated only part of the month of June; that it was not operated at all during the month of July, and was only in operation in October during the first seven days of that month.

42 The figures testified to by the witness Forbes have been recapitulated. Upon the arguments and upon this evidence, it is claimed on the part of the United States that the average amount of spirits produced from each bushel of grain at this distillery, after the seizure in May, 1875, and during the months of May, June, September, and during the first seven days of October, was larger than such amount in the preceding months, and, from which ascertainment and computations, counsel for the U. S. deduces and urges the conclusion that the alleged diminished average during the months preceding the month of May, and including the month of April, is attributable to illicit productions of the distillery during those preceding months, and that this is evidence that such alleged illicit manufacture was carried on during the month of April, and during the days covered by the assessment in question, namely, the last five days of that month. This evidence, and the claim thus urged by the U. S. attorney, is to be considered, in connection with testimony which has been adduced on the part of the defendants, in answer or explanation of the testimony on the part of the prosecution, and with the claim urged by

43 counsel for the defendants, and it is for you to say what value and weight are to be given to this evidence, which is circumstantial in its nature, but which it is claimed, as I have already said, tends to show that spirits were produced at the distillery, during the time covered by the assessment, which escaped the payment of taxes due thereon.

Witnesses have also been examined on the part of the United States whose testimony, it is claimed, shows that at or about the time covered by the assessment in question, the defendant Lewis Rindskopf paid money to persons in the internal-revenue service for the purpose of enabling him to prosecute the illicit manufacture of spirits with impunity, and which, it is claimed, also tends to show that the producing capacity of his distillery as fixed by the survey and estimate in the collector's office was not a measure of the amount of production which it was possible to make. Some of these witnesses have testified to alleged conversations with the defendant Lewis Rindskopf, in which, it is claimed, he admitted that he was making illicit spirits.

There has been also introduced the testimony of witnesses, who, in June, 1875, examined the distillery promises, and whose testi-

44 mony, it is claimed, shows that there were discovered certain facilities for secretly removing spirits from the wine-room of the distillery.

Upon the whole testimony thus adduced on the part of the United States, it is claimed that at the time when the assessment in question was made there were sufficient grounds for making the assessment; that the defendant Lewis Rindskopf was then engaged in the production

and removal of spirits upon which the taxes were not paid, and that the evidence thus offered is sufficient to uphold and establish the assessment as against the evidence introduced by the defendants to overthrow it.

It is admitted by the defendant Lewis Rindskopf in his testimony that he gave money to some of the United States gaugers in 1874; but that such moneys were not paid for the purpose of corrupting those officers, but to secure a fair and full guage of the spirits which he had produced; that he paid no money into a corruption fund, and that the payments which he did thus make to guagers were legitimate, and were not made for the purpose of inducing them to violate the law. Again, it is claimed touching the alleged increase of reported production of spirits at his distillery in months subsequent to May, 1875, that such increase
45 was attributable to the introduction and use, in the process of distillation, of a new quality and character of yeast, and that the variations in yield of spirits, if any, were not attributable to such causes as are claimed on the part of the prosecution; and, in this connection, I may say to you that the variation, if any, in the yield of the distillery as claimed upon the evidence offered in connection with the testimony of the witness, Forbes, does not of itself necessarily prove illicit distillation of spirits, but it is a fact to be properly considered as bearing on that question. In the light of all the evidence it is to be determined by you whether such variation was attributable to illicit manufacture, or to other causes, and if it was attributable to other causes, then, of course, it is a circumstance of no weight in this investigation.

In the closing testimony on the part of the defence the alleged admissions of the defendant Lewis Rindskopf, testified to by other witnesses, that he made and produced illicit spirits at his distillery, have been denied, and a conflict as to the facts in that regard is presented, which you must settle.

Testimony has been also offered tending to show the manner of construction of the vats in the cistern-room, it being claimed on
46 the part of the government that facilities were designedly provided for unlawful removal of spirits from the high-wine tubs, and it being claimed by defendants that no means were provided or employed to effect any purpose other than the legitimate prosecution of the business.

In passing upon the validity of this assessment, and in determining the question of liability on account of it, it is to be taken and considered in its entirety: Either the government is entitled to recover the exact amount of the assessment, namely, the sum of $3,276, or it is not entitled to recover any sum whatever. The court and jury upon an investigation of the justness and validity of the assessment have no right to exercise the powers committed to the Commissioner, but our right is limited to an enquiry into the question as to whether the assessment which has been made embraces or represents a just and valid demand against the defendant distiller, and as the result of such investigation it must either wholly stand or wholly fall.

And the jury are further to bear in mind that the principal question here is not whether the defendant distiller at other periods
47 than the period covered by the assessment was engaged in the illicit manufacture and removal of spirits, but that it is whether the facts in that regard existing at the time covered by the assessment were such as to justify the Commissioner in assessing for the days mentioned in the assessment a tax against the defendant distiller for and on account of illicit spirits produced and unlawfully removed on those

days. This is the specific question, and it is the duty of the jury with proper discrimination to consider and weigh the testimony in that regard, and as it bears on that question.

In other words, evidence that at other times than the period covered by the assessment the defendant Lewis Rindskopf may have engaged in the illicit production and removal of spirits would not be of itself absolute proof that he manufactured illicit spirits during the time covered by the assessment or to the extent named in the assessment, though such evidence, in connection with any other evidence and circumstances pointing to the same end, may properly be considered by the jury as bearing circumstantially upon the question as to whether the defendant distiller was guilty of producing and removing, without payment of the taxes thereon, the spirits described in the assessment. * * *

(End of charge.)

48 To all of that portion of said charge which defines and sets forth the legal force and effect of an assessment, and the means whereby it may be attached and overcome; to all of that portion of said charge which touches the entirety of the assessment, and affirms that the plaintiff must recover the exact amount of the assessment, or nothing; to all that portion of the charge stated in the following language: "And the jury are further to bear in mind that the principal question here is, not whether the defendant distiller at other periods than the period covered by the assessment was engaged in the illicit manufacture and removal of spirits, but that it is whether the facts in that regard existing at the time covered by the assessment were such as to justify the Commissioner in assessing for the days mentioned in the assessment a tax against the defendant distiller for and on account of illicit spirits produced and unlawfully removed on those days," the plaintiff then and there duly excepted.

In the progress of the trial, and after the defendants had opened the case on their part to the jury, the defendants offered in evi-
49 dence the assessment of November 1st, 1875, and the record of the chancery suit mentioned and referred to in the charge of the court, which evidence was objected to by the attorney for the United States. This objection was overruled and the evidence received conditionally, that is to say, the court stated that the same might be received and that proper instructions would be given to the jury in the charge in relation to the same. No offer being made by counsel for defendants to show that the spirits embraced in the assessment involved in the suit at bar were also embraced in the assessment of November 1st, 1875.

To this ruling of the court the attorney for the United States excepted.

After being out several hours the jury returned to the court-room for further instructions, and propounded the following enquiry to the court, viz, Must the jury be satisfied from the evidence that the spirits on which the assessment is based were produced as well as removed from the distillery premises during the five days covered by the assessment? In answer to which enquiry the court, first calling attention to the al-
50 legations of the pleadings, repeated the instructions of the charge on that behalf, when the jury again retired, and shortly after returned with a verdict for the defendants.

The plaintiff thereupon filed a motion for a new trial, on several grounds, which motion is among the papers constituting the record herein, and to which reference is hereby made, which motion was sub-

sequently argued and overruled, the plaintiff duly excepting to such ruling and decision, and judgment was rendered on the verdict in favor of the defendants and against the plaintiff. And because the above and foregoing does not appear of record herein, this bill of exceptions is signed, sanctioned, and settled this fourteenth day of July, A. D. 1880.

(Signed) CHAS. E. DYER, *Judge.*

51 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a full and complete transcript of the record in the case of The United States vs. Lewis Rindskopf, Raphael Reichmann, and Elias Rindskopf. At law.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 30th day of June, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 106th.

[SEAL.] EDWARD KURTZ, *Clerk.*

52 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between The United States of America, plaintiff, and Lewis Rindskopf, Raphael Reichmann, & Elias Rindskopf, defendant', a manifest error hath happened, to the great damage of the said The United States of America, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness, the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this eighteenth day of March, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 105th.

EDWARD KURTZ, *Clerk,*
U. S. Circuit Court for the Eastern Dist. of Wisconsin.

53 THE UNITED STATES OF AMERICA, *ss:*

To Lewis Rindskopf, Raphael Reichmann and Elias Rindskopf, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein The United States of America are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in the said district, this 18th day of March, A. D. 1881, and of the Independence of the United States the 105th.

[SEAL.] CHAS. E. DYER, *Judge.*

We accept service of the above citation, this 7th day of July, A. D. 1881.

COTTRILL & CARY,
Att'ys Def'ts Lewis Rindskopf & Elias Rindskopf.

(Indorsement on cover:) No. 881. The United States, plaintiff in error, vs. Lewis Rindskopf, Raphal Reichmann, and Elias Rindskopf. E. Wisconsin, C. C. U. S. Filed 22nd August, 1881.

REC. 881—3

SUPREME COURT U. S.
FILED
MAR 8 1882
JAMES W. McKENNEY, CLERK

In the Supreme Court of the United States.

THE UNITED STATES
vs.
RINDSKOPF ET AL. } No. 881.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

THE UNITED STATES
vs.
RINDSKOPF ET AL.
No. 881.

BRIEF FOR THE UNITED STATES.

This was an action upon a distiller's bond.

The *complaint* alleged as breach the non-payment of taxes ($3,276) upon 3,640 gallons of spirits made between April 25, and May 1, 1875, and showed also that the Commissioner of Internal Revenue had assessed such tax, and the same had been demanded, &c.

The *answers* contained—

1. A general denial of each and every allegation in the complaint, and,

2. An allegation that a certain bill in equity theretofore filed by the plaintiffs against the defendants, and then pending, covered the same cause of action.

The plaintiffs made out their case by introducing the assessment; thereupon the defendants called witnesses to show that they had accounted to the government for all the spirits which they had distilled.

In reply the United States produced evidence tending to show that spirits were manufactured and removed

from the distillery during the days covered by the assessment, and that tax was not paid upon them, &c.

The court instructed the jury in part as follows:

Touching this *second* defence, it may be here remarked that I have admitted in evidence the record of the assessment of Nov. 1st, 1875, and of the chancery suit, in which that assessment was held unsustained and invalid, holding, however, at the time it was so admitted that without further proof tending affirmatively to show that the spirits mentioned in the second assessment were included in the 1st assessment, such record of the first assessment and of the chancery suit would not be a bar to the prosecution of this action, and to that opinion I still adhere and reiterate the ruling heretofore made upon that branch of the case. As just stated, the *first* defence which consists of a general denial of liability, involves the correctness and validity of the assessment in question, and in maintaining this defence it is contended that the defendant Lewis Rindskopf did not manufacture and produce within the period covered by the assessment in question the quantity of spirits upon which taxes were not paid, which is stated in and forms the basis of that assessment, and it is denied that he manufactured and produced any spirits upon which the taxes were not paid during the period covered by the assessment.

I have already spoken of the general power of the Commissioner in making an assessment like that in question here. This power is one of the most important delegated to the Commissioner, and can only be duly exercised upon evidence which fully satisfies his mind that it ought to be exercised. When therefore an assessment has been made by this officer it is to be presumed, until such presumption is overcome by proof to the contrary, that it was made upon sufficient evidence, and it is not necessary that the evidence upon which the Commissioner acted should be laid before the jury. In other words the jury have a right to presume until the contrary appears that when the Commissioner made the assessment in question he had befors him proofs which were sufficient to satisfy a just and fair-minded person that such assessment ought to be made; and before the jury can disregard the assessment they should be convinced by the evidence that the Commissioner acted in making it in a manner unjust to the defendant distiller and unwarranted by the actual facts. Such an assessment is not, however, conclu-

sive evidence of the liability of the distiller; it is open to attack; it is prima facie proof only of such liability, and prima facie evidence is such evidence as is sufficient when unassailed to establish a given fact, and it remains sufficient for that purpose until it is rebutted and overcome. The defendants have the right to introduce evidence to overcome the assessment. Such evidence may consist of the testimony of witnesses that no spirits were manufactured during the period covered by the assessment and removed from the distillery upon which the government tax was not paid, and of circumstances which tend to the same conclusion. (Record, p. 14.)

* * * * * * *

The government in the first instance, to maintain the issue upon its part, introduced in evidence the assessment in question, and the bond executed by the defendants. This made a prima facie case against the defendants, and if no proofs had been offered on the part of defendants assailing the correctness and justice of the assessment, the plaintiff, upon production of the assessment and bond, would have been entitled to a verdict for the amount of the assessment. Thus the case stood before any evidence was offered on the part of the defendants.

The defendants then proceeded to introduce evidence on their part for the purpose of overthrowing the assessment, and their testimony being concluded, the plaintiff then assumed the burden of sustaining the assessment and of attempting to show that it was a correct, just, and valid proceeding on the part of the Commissioner, so that the question is now open for you to determine, and it is your duty to determine whether or not the defendant, Lewis Rindskopf, did, on the 26th, 27th, 28th, 29th, and 30th days of April, 1875, remove from his distillery to a place other than the bonded warehouse, 3,640 proof gallons of distilled spirits without payment of the government tax thereon, and if upon the whole evidence you find that he did, then the plaintiff will be entitled to a verdict for the amount of the assessment. If, on the contrary, you find that he did not, then of necessity you will find that the Commissioner's assessment is not sustained and ought not to have been made, and the defendants will be entitled to a verdict (p. 15). * * *

In passing upon the validity of this assessment, and in determining the question of liable on account of it, it is to be taken and considered in its entirety. Either the government is entitled to recover

the exact amount of the assessment, namely, the sum of $3,276, or it is not entitled to recover any sum whatever. The court and jury, upon an investigation of the justness and validity of the assessment, have no right to exercise the powers committed to the Commissioner, but our right is limited to an inquiry into the question as to whether the assessment which has been made embraces or represents a just and valid demand against the defendant distiller, and as the result of such investigation it must either wholly stand or wholly fall.

And the jury are further to bear in mind that the principal question here is not whether the defendant distiller at other periods than the period covered by the assessment was engaged in the illicit manufacture and removal of spirits, but that it is whether the facts in that regard existing at the time covered by the assessment were such as to justify the Commissioner in assessing for the days mentioned in the assessment a tax against the defendant distiller for and on account of illicit spirits produced and unlawfully removed on those days. This is the specific question, and it is the duty of the jury, with proper discrimination, to consider and weigh the testimony in that regard, and as it bears on that question (pp. 18, 19).

* * * * * * *

To all of that portion of said charge which defines and sets forth the legal force and effect of an assessment, and the means whereby it may attached and overcome; to all that portion of said charge which touches the entirety of the assessment, and affirms that the plaintiff must recover the exact amount of the assessment, or nothing; to all that portion of the charge stated in the following language: "And the jury are further to bear in mind that the principal question here is, not whether the defendant distiller at other periods than the periods covered by the assessment was engaged in the illicit manufacture and removal of spirits, but that it is whether the facts in that regard existing at the time covered by the assessment were such as to justify the Commissioner in assessing for the days mentioned in the assessment a tax against the defendant distiller for and on account of illicit spirits produced and unlawfully removed on those days," the plaintiff then and there duly excepted.

In the progress of the trial, and after the defendants had opened the case on their part to the jury, the defendants offered in evi-

dence the assessment of November 1, 1875, and the record of the chancery suit mentioned and referred to in the charge of the court, which evidence was objected to by the attorney for the United States. This objection was overruled, and the evidence received conditionally; that is to say, the court stated that the same might be received and that proper instructions would be given to the jury in the charge in relation to the same; no offer being made by counsel for defendants to show that the spirits embraced in the assessments involved in the suit at bar were also embraced in the assessment of November 1, 1875.

To this ruling of the court the attorney for the United States excepted (p. 19).

For error I assign—

1. The admission in evidence of the record of the suit in equity.

Also, the following instructions to the jury:

2. That the *assessment* was only *prima facie*, not *conclusive*, evidence of the tax debt.

3. That the assessment must stand or fall *as a whole*.

4. That, to entitle the United States to recover, *not only the distillation, but also the removal* of the spirits, must be shown to have occurred betwixt April 26 and May 1, 1875.

1. It was error to admit the record of the equity suit.

His honor admitted it upon condition that *evidence* should subsequently be introduced to show that the tax in question had been also included in that suit.

The record in this case shows that no such *evidence* was introduced. Yet the jury was not so instructed, although the existence or non-existence of evidence is matter of law; but the judge called their attention to the introduction of the equity record, and to the condition upon which it had been allowed.

I submit that after such allowance it was erroneous not to remove its effect by some express instruction. It is not a case in which the absence of an instruction may be imputed as a fault to the party interested in its being given *because he had neglected to ask for it;* for here the court had placed itself in a situation where, unless *sua sponte* it undid its own previous action, it would err.

2. The court erred in instructing the jury, that the assessment was only *prima facie* (not *conclusive*) evidence of the tax therein stated.

This assignment brings up for review the rule in Clinkenbeard's case, which was established in this court by a majority vote, and is reported 22 Wallace, 65.

It has been suggested that the court would not be averse to a reconsideration of this question, not only because so decided, but also because some doubt is felt in the Internal Revenue Department whether the terms of the rule limit it to cases where (to use words which appear at one point in the Opinion in Clinkenbeard's case) assessors *have exceeded "the scope of their jurisdiction,"* or whether they *cover all cases in which an assessor has erred,* whether in law or in fact.

This is a question which is said to occur not unfrequently in the business of that department, and is of importance.

The statutes which affect the matter are as follows:

Revised Statutes, section 3309:

On the receipt of the distiller's return in each month, the Commissioner of Internal Revenue shall inquire and determine whether the distiller has accounted for all the grain and molasses used, and all the spirits produced by him in the preceding month.

[After providing for the case in which *a distiller has accounted for all the spirits produced by him,* the section proceeds:]

If the Commissioner finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of ninety cents for every proof gallon: *Provided*, That the actual product shall be assumed to be in no case less than eighty per centum of the producing capacity of the distillery, as estimated according to law. All assessments made under this section shall be a lien on all distilled spirits on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the tract of land whereon the said distillery is located, and any building thereon, from the time such assessment is made until the same shall have been paid.

Section 3226:

No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive, or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of (the) Internal Revenue, according to the provisions of the law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.

3. The court erred in holding that the assessment must stand or fall *as an entirety*.

Supposing the assessment to be no more than prima facie evidence of the amount of the debt therein stated, no reason occurs why it is not so as to every part of such debt. The defect here relied upon is not one which affects the *jurisdiction* or *bona fides* of the assessor, or any other necessary *quality* of the assessment. Defect as to

such matters would of course avoid the assessment in omnibus. But the issue made here is as to *the quantity of spirits produced.* It may in the present instance extend to the whole quantity, but in its nature it raises a question of more or less, and the instruction under consideration assumes that the jury might, as matter of fact, find that the assessment was well founded as to (say) *one-half* of the number of gallons charged. In such event the learned judge instructed them that they should treat the assessment as a nullity.

The case is one in which the Commissioner and the distiller are at issue about the operations of the latter. Thereupon the former, in compliance with his official duty, and informing himself as well as he could, made an assessment and notified the distiller thereof. The latter disregarded the notice, and a suit was brought. It was admitted by the distiller that the assessment is prima facie evidence of its conclusions, but he sought to rebut this by showing facts under which the jury *might have found* that the Commissioner had charged the distiller with (say) twice as many gallons as had been distilled. The question being one *of evidence* merely, *i. e.*, one not embarrassed by technical considerations, I see no reason why an official act of that sort should not be held *good for all of it that is not disproved.*

The learned judge below assigns as a reason why an assessment must stand or fall *as a whole*, that, "the court and jury upon an investigation of the justice and validity of the assessment have no right to exercise the powers of the Commissioner." I submit that the logical application of this proposition to cases like the pres-

ent, *i. e.*, cases of judicial criticism of an assessment actually made, leads to a conclusion that in all cases where *jurisdiction* and *bona fides* exist, *i. e.*, where the criticism is that the Commissioner has erred in mere matter of fact, a court and jury have no power to rectify his action at all; in other words, that a mere *exaggeration* of the amount of assessment, so far from being fatal is of no moment whatever. It is said that *the court and jury cannot reassess.* Therefore, if what they are called upon to do amounts to no more than *that*, even if they satisfy themselves that the assessment is entirely erroneous, they are bound by its conclusions.

Such has been the view of the United States while endeavoring to maintain the second assignment of error. If that view be incorrect, as in arguing the present question must be admitted, good sense seems to suggest that a suit like the present: upon a bond with conditions *alleging* a specific breach, and *answered* by a general denial: leaves the subject matter of contest *at large*, the effect of the assessment as evidence being no more than to throw the *onus probandi* upon the distiller. To hold that the present assessment, being for 3,640 gallons, would be totally *avoided* by proof by the distiller that he had distilled only 3,639 gallons, seems to be a mere parody upon the proposition contended for by the United States in Clinkenbeard's case.

4. It was error to instruct the jury that in order to maintain their case the United States would have to prove that the spirits were not only *distilled*, but also *removed* between April 26 and May 1, 1875.

The *declaration* states no more than that the spirits were "*distilled by him*" within that period, and there seems to be nothing about the *statute* to prevent the distiller from being responsible for a tax upon spirits then distilled, even if not removed until afterwards.

S. F. PHILLIPS,
Solicitor-General.

JAMES H. McKEN

Supreme Court of the United States.

THE UNITED STATES,

Plaintiff in Error,

vs.

LEWIS RINDSKOPF, RAPHAEL REICHMAN AND ELIAS RINDSKOPF,

Defendants in Error.

No. 881. In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF OF DEFENDANTS IN ERROR.

COTTRILL & CARY,
Attorneys for Defendants in Error.

ABRAHAM & MAYER,
Of Counsel.

Burdick & Armitage, Printers.

Supreme Court of the United States.

THE UNITED STATES,

Plaintiff in Error,

vs.

LEWIS RINDSKOPF, RAPHAEL REICHMAN AND ELIAS RINDSKOPF,

Defendants in Error.

No. 881. In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

This action was brought upon a bond executed by Lewis Rindskopf as a distiller, with Reichman and Elias Rindskopf as sureties. The complaint alleges the giving of the bond March 23, 1875; that Rindskopf was then engaged in business as a distiller; the giving of the bond, copy of which in the usual form of distillers' bond is annexed; that the condition of the bond has been broken, in that Rindskopf failed, neglected and refused to pay the internal revenue tax alleged to be due and payable upon 3640 proof gallons of spirits alleged to have been

distilled by him between April 25, 1875 and May 1, 1875, and that he was assessed therefor on the special list of October, 1875, $3,276, for which judgment is asked. Record, folio 5, *et seq.*

The answer of the defendants denies all the allegations of the complaint. It further alleges that November 1, 1875, the Commissioner of Internal Revenue made an assessment upon Rindskopf amounting to the sum of $7,117.20 for spirits alleged to have been distilled in the month of April, 1875, and removed without payment of government tax; that this assessment was returned to the collector of the district who demanded payment thereof; that May 19, 1875, the plaintiff filed a bill in equity in the court below to enforce payment of this assessment; that Rindskopf was served with process, and has appeared and answered such bill, alleging that the assessment was wholly illegal, unauthorized and void, and that such equity cause was still pending and undetermined; and that the assessment set forth in the complaint was upon spirits alleged to have been produced at the same distillery and during the same month as that for which the assessment of $7,117.20 was made; that each assessment was unauthorized and void, and was made without either the existence or proof of any facts whatever authorizing the same to be made.

A supplemental and amended answer was afterwards filed. It repeated the allegations of the original answer, with this addition, that the equity case came on for final hearing April 23, 1879—the answer having been filed March 15, 1879—when the bill filed was absolutely and finally dismissed, and the assessment was adjudged to be illegal, unwarranted in law or equity, and void. The answer plead this decree in bar of the action. Record, p. 12 and 18. The trial occupied five days.

There is no statement of the testimony, which was voluminous, except that it is stated that the plaintiff offered evidence tending to maintain the issues on its part as stated in the charge, and the defendants offered evidence tending to maintain the issues on their part as stated in the charge—folio 27. At folio 49, it is stated that the defendants offered in evidence

the assessment of November 1, 1875, and the record of the equity suit thereon.

The verdict was for defendants, the case being tried before Mr. Justice Dyer; and afterwards a motion for a new trial was heard before Mr. Justice Drummond and Mr. Justice Dyer, and denied.

POINTS AND ARGUMENT.

I.

All the questions of fact were left to the jury under the instructions of the court. The facts are not here, and can only be judged of so far as they are detailed in the charge. The only exceptions taken are to the charge, with no detail of the evidence.

The defendants therefore assume here that the facts proven were as stated in the charge.

The exceptions, folio 48, are:

1. "To all that portion of said charge which defines and sets forth the legal force and effect of an assessment and the means by which it may be attacked and overcome;

2. To all that portion of said charge which touches the entirety of the assessment, and affirms that the plaintiff must recover the exact amount of the assessment or nothing;

3. To all that portion of said charge stated in the following language;

"And the jury are further to bear in mind that the principal question here is, not whether the defendant distiller at other periods than the period covered by the assessment was engaged in the illicit manufacture and removal of spirits, but that it is whether the facts in that regard existing at the time covered by the assessment, were such as to justify the commissioner in assessing for the days mentioned in the assessment a tax against the defendant distiller for and on account of illicit spirits produced and unlawfully removed on those days."

4. There is an exception to the receipt in evidence of the assessment of November 1, 1875, and of the record of the action in equity thereon, in which the bill of complaint of the government was dismissed.

5. There is an exception to the decision overruling the motion for a new trial.

We shall consider these exceptions in their order.

II.

The first exception is to all that portion of the charge which defines and sets forth the legal force and effect of an assessment, and the means whereby it may be attacked and overcome.

The bill of exceptions, in violation of the 4th rule of this court, sets forth "the charge of the court at large." (Quoted from the rule). The rule further says: "But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and such matters of law and those only shall be inserted in the bill of exceptions and allowed by the court."

The exception is submitted as being too general to be considered here.

Lincoln vs. Claflin, 7 *Wallace*, 132, in which it is said: "A bill of exceptions should only present the rulings of the court upon some matters of law, as upon the admission or exclusion of evidence, and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issues involved." Opinion by Mr. Justice Field.

Exparte Crane, 5 *Peters*, 190, at page 198, the court says: "In Carver's case, 4 Peters 80, the court said: 'We take this occasion to express our decided disapprobation of the practice (which seems of late to have gained ground) of bringing the charge of the court below a

'length, before this court for review. It is an unauthorized 'practice, and extremely inconvenient both to the Inferior and 'to the Appellate Court. With the charge to the jury upon 'mere matters of fact, and with its commentaries upon the 'weight of evidence, this court has nothing to do,' etc."

In this case the whole charge is given in the bill of exceptions, but none of the evidence is set forth.

But, looking at the charge, it held in substance that the assessment was *prima facie* evidence of liability, but that the defendant might attack it; that if he successfully attacked it, then the burden shifted to the government to show its validity. This course and order, as the charge shows, was pursued at the trial, and the District Judge left the whole case to the jury upon all the evidence.

The charge we submit was correct in respect to attacking the assessment.

In *Dandelet vs. Smith*, 18 *Wallace*, at page 647, the court say: "The exact truth always lies in the knowledge of the manufacturer. His books show or ought to show everything that he has produced, and in an investigation of this kind, if he shows that his returns or stamps fully equal the amount of his production and sale, the burden will then be on the government to show a deficiency."

The same doctrine was held in the case of *Clinkenbeard vs. U. S.*, 21 *Wallace*, 65.

See also *U. S. vs. Myers*, Internal Revenue Record, Feb. 11, 1878.

In the latter case we are informed that this writ of error by the government has been by it voluntarily dismissed.

The charge that the assessment was *prima facie* evidence of liability was at least all the government could ask.

The defendants in error deny that that is the law. The assessment is to be made only when the commissioner obtains knowledge of the fact. R. S. U. S., sections 3253 and 3309. He is not a judicial officer and cannot be vested with judicial power. That power under the constitution, Sec. 1, Article 3, is vested "in one Supreme Court and in

such inferior courts as the congress may, from time to time, ordain and establish." It seems to us remarkable to hold that a simple government officer may, by his simple fiat, create any amount of liability against any individual and make it even *prima facie* evidence of liability. He may be perhaps a *quasi* judicial officer—whatever that term may mean—but we suggest there is a large and wide difference between a *quasi* and an actual, living, and constitutionally appointed or elected judicial officer. The assessment is not due process of law.

In *Ins. Co. vs. Snyder*, 93 *U. S.*, 393, the charge of which defendant complained was said to increase its chances to defeat the action.

In this case it increased the chances for recovery.

III.

The argument upon the preceding point disposes of further argument upon the second exception taken, save only the charge of the court as to the entirety of the assessment. If that point is here, as the bill of exceptions is framed, and we submit it is not, the charge we urge was correct in this particular. The assessment was an entirety, made in one sum for a gross number of gallons, namely, 3,640, and for a gross sum, namely, $3,276. It was not for alleged daily removals, but for so many gallons for the entire period. But there was no evidence, and none is contained in the bill of exceptions, showing that if not good in whole it might be good in part. And the jury were told, folio 46, that "our right is limited to an enquiry into the question as to whether the assessment * * * represents a just and valid demand."

IV.

It seems hardly necessary to discuss the third point of exception. The action was to recover for spirits produced and

removed without payment of goverment tax during five specified days, and the assessment was for those days. It was quite immaterial that frauds had been committed at other times. If there were, the defendants were not sued concerning them, but only for the five days.

V.

As to the exception as to the receipt in evidence of the assessment of November 1, 1875, and the suit and judgment thereon. The court, at folio 32, distinctly charged the jury that it would not bar the present action unless it was shown—really by defendants, upon whom the court cast the burden of showing it,—that it covered the same spirits sued for in this action.

This was very favorable to the Government, and more so, as defendants in error insist that it was entitled to.

The idea of the court was that successive assessments might be made covering the same period of time. The defendants contended that one assessment for a particular period exhausted the power of assessment. And this, they submit, is the law. But, however this may be, it is submitted that this portion of the charge could not have affected the verdict, as the whole evidence was submitted to the jury.

VI.

The exception to the order overruling the motion for a new trial, is fully disposed of by the case of

Pomeroy's Lessee vs. Bank of Indiana, 1 Wallace 592.

The court in that case, says:

"Authorities are numerous that a motion for a new trial in

the Federal Courts is a motion addressed to the discretion of the court, and that the decision of the court in granting or refusing it is not the proper subject of a bill of exceptions." The following cases are cited:

Henderson vs. Moore, 3 Cranch 11.
Mar. Ins. Co. vs. Young, Id. 187.
McLanahan vs. Ins. Co., 1 Peters 183.
U. S. vs. Buford, 3 Peters 32.
Barr vs. Grats, 4 Wheaton 213.
Blumb vs. Smith, 7 Wharton, 248.
Brown vs. Clarke, 4 Howard 4.

VII.

In the charge, folio 48, it is stated that it was proved and admitted that the productive capacity of the distillery for April, 1875, was in proof gallons 31.225.74
Reported as produced 25.963.69
1,000 gallons more than 80 per cent. of capacity.
Same month he paid upon gallons 30.286.07
Capacity 31.225.74
Reported 25.963.69
Add assessment 3.640

Add November assessment 8.686 38.289.69

Excess—gallons 7.064
Assessed capacity—gallons 31.225.74
Taxes paid on " 30.286.07

The gauger, storekeeper, manager, and every employe, but one dead, were examined, folio 39. It will not be denied that they all testified to entire regularity and no fraud in the management of the distillery.

In *U. S. vs. Ferrary*, 93 *U. S.* 625, it was held that the survey of the distillery was conclusive upon the government until a resurvey was made.

It is further to be noticed that the complaint simply alleges that Rindskopf did not, in all respects, faithfully comply with all the provisions of law in relation to distillers, the breach alleged being merely the non-payment of the tax.

It is not alleged that the spirits were removed from the place where they were distilled so as to justify the assessment under sec. 3253; nor that the production exceeded the capacity; nor that the distiller had not accounted for all the spirits produced so as to justify the assessment under section 3309; nor that they were removed without payment of government tax; see sec. 3296. The allegation simply is that they were produced, and the tax not paid. We submit that the distiller might, if he saw fit, decline to pay the tax and thus surrender the property to the government.

The whole case was submitted to the jury in an elaborate charge. It is submitted the judgment should be affirmed.

COTTRILL & CARY,
Attorneys for Defendants in Error.

ABRAHAM & MAYER,
Of Counsel.